

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

CITY OF MADISON,

Plaintiff,

v.

Case No. 19 CV 184

VILLAGE OF MCFARLAND,
et al.,

Defendants.

FILED**FEB 20 2020**

DANE COUNTY CIRCUIT COURT

DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

Defendants Imp Farm, LLC and Storck Road Farm LLC own five parcels of land totaling 147.83 acres in the Town of Blooming Grove, Dane County, Wisconsin. The land lies north of Siggelkow Road, contiguous to both the City of Madison and the Village of McFarland. The individual defendants reside on the property.

On October 18, 2018, the two LLC and four individual defendants filed a petition for direct annexation of the property by defendant Village of McFarland. Except for the issues raised by the plaintiff City of Madison in this lawsuit, the parties stipulate that the annexation petition is statutorily sufficient in all respects.

Responding to the annexation petition, the defendant Village of McFarland adopted an ordinance annexing the property. Again, except for the issues raised by the City of Madison here, the parties stipulate that the Village's annexation ordinance is statutorily sufficient in all respects.

In this action, the City of Madison seeks judgment declaring the annexation petition and the Village's annexation ordinance invalid as a matter of law. They further move this court to enjoin the Village of McFarland from enacting any further annexation ordinances concerning these Town of Blooming Grove lands before November 1, 2027. On that date, a state-approved Cooperative Plan entered between the City of Madison and the Town of Blooming Grove under sec. 66.307, Stats., which addresses the 147.83 acres at issue here, terminates. The City of Madison contends that the Cooperative Plan bars the Village of McFarland from annexing these Town of Blooming Grove lands in the interim.

Before the court are cross-motions for summary judgment filed by all the parties. The motions have been expertly briefed upon a stipulated set of undisputed material facts (not reiterated here). Helpful oral argument was held on February 12, 2020. Accordingly, the motions are ripe for decision.

Because defendants are entitled to judgment as a matter of law, the court GRANTS the defense motions and DENIES the City of Madison's motion.

ANALYSIS AND DECISION

This case presents two issues of first impression.

First, does a state-approved Cooperative Plan between two municipalities under sec. 66.0307, Stats., bar landowners and municipalities who are not parties to the Cooperative Plan from exercising their statutory annexation rights. I conclude it does not.

Second, does the court-created Rule of Prior Precedence directed at dueling concurrent annexation or municipal incorporation petitions apply to a situation, as here, where a Cooperative Plan between two municipalities competes with an annexation proceeding involving a third municipality which is not a party to the Cooperative Plan. I conclude it does not. Because the Cooperative Plan between the Town of Blooming Grove and the City of Madison is not an annexation proceeding, I do not believe the factual situation in our case was contemplated by our Supreme Court when formulating the Rule of Prior Precedence. Therefore I decline to extend the rule here. More importantly, this is an issue exclusively for the Supreme Court, which adopted the common law rule in the first place.

I do not decide defendants' challenge to the City of Madison's standing to bring this lawsuit because defendants prevail on the substantive issues raised by the City of Madison.

I. Cooperative Plan v. Annexation Petition:

Section 66.0307, Stats., is attached to this decision in its entirety because it is too lengthy to quote.

Most pertinent to our analysis here are subsections (6) and (7):

(6) Binding elements of cooperative plan. If a cooperative plan is approved by the department under sub. (5) or an amended plan is approved under sub. (8), provisions in the plan to maintain existing boundaries, the boundary changes in the plan, the schedule for those changes, the plan for delivery of services, including road maintenance, and the schedule for those services are binding on the parties to the plan and have the force and effect of a contract.

(7) Other boundary procedures. (a) *Other procedures after hearing.* After the joint hearing under sub. (4)(b) is held, no other procedure, except the procedure under s. 281.43(1m), for altering a municipality's boundaries may be used to alter a boundary

included in the proposed cooperative plan under sub. (3)(d)1. until the boundary is no longer included in the proposed cooperative plan, the municipality withdraws from the proposed cooperative plan or the proposed cooperative plan fails to receive approval from the department, whichever occurs first.

(b) *Other boundary procedures during the planning period.* During the planning period specified under sub. (3)(f), no other procedure for altering a municipality's boundaries may be used to alter a boundary that is included in the cooperative plan under sub. (3)(d)1., except if an annexation is conducted under s. 281.43(1m), regardless of whether the boundary is proposed to be maintained or changed or is allowed to be changed under the plan. After the planning period has expired, the boundary may be altered.

The City of Madison argues that the Village of McFarland's annexation of the subject acreage, altering both the Town of Blooming Grove's and Village of McFarland's boundaries during the Cooperative Plan's planning period, is barred by subsection (7)(b)'s express language:

(b) *Other boundary procedures during the planning period.* During the planning period specified under sub. (3)(f), no other procedure for altering a municipality's boundaries may be used to alter a boundary that is included in the cooperative plan except [not applicable]...

The language is facially unlimited in its scope, so the argument goes, and controls the annexation rights of not only the parties to the Cooperative Plan, but all other municipalities that might otherwise enjoy statutory rights to annex the acreage in the Plan.

Defendants, on the other hand, interpret the above language as limiting only the annexation rights of the parties to the Cooperative Plan.

Although the City's argument is plausible based solely upon subsection (7)(b)'s language, the defendants are correct for at least two reasons.

First, subsection (7)(b) cannot be read in isolation from the balance of sec. 66.0307. In other words, the entire context of the statute is necessary to divine the meaning of any particular provision.

¶ 45 Thus, we have repeatedly held that statutory interpretation “begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *Seider*, 236 Wis.2d at 232, 612 N.W.2d 659; *see also Setagord*, 211 Wis.2d at 406, 565 N.W.2d 506; *Williams*, 198 Wis.2d at 525, 544 N.W.2d 406; *Martin*, 162 Wis.2d at 893–94, 470 N.W.2d 900. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Bruno v. Milwaukee County*, 2003 WI 28, ¶¶ 8, 20, 260 Wis.2d 633, 660 N.W.2d 656; *see also* Wis. Stat. § 990.01(1). 2526272829303132 ¶ 46 Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in

relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. *State v. Delaney*, 2003 WI 9, ¶ 13, 259 Wis.2d 77, 658 N.W.2d 416; *Landis v. Physicians Ins. Co. of Wis.*, 2001 WI 86, ¶ 16, 245 Wis.2d 1, 628 N.W.2d 893; *Seider*, 236 Wis.2d 211, ¶ 43, 612 N.W.2d 659. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. *Martin*, 162 Wis.2d at 894, 470 N.W.2d 900; *Bruno*, 260 Wis.2d 633, ¶ 24, 660 N.W.2d 656. “If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.” *Bruno*, 260 Wis.2d 633, ¶ 20, 660 N.W.2d 656. Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. *Id.*, ¶ 7; *664 *Cramer*, 236 Wis.2d 473, ¶ 18, 613 N.W.2d 591; *Seider*, 236 Wis.2d 211, ¶ 50, 612 N.W.2d 659; *Martin*, 162 Wis.2d at 893–94, 470 N.W.2d 900. “In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.” *State v. Pratt*, 36 Wis.2d 312, 317, 153 N.W.2d 18 (1967).

State ex rel. Kalal v. Circuit Court for Dane Cty., 271 Wis. 2d 633, 663–64 (2004).

Throughout the vast majority of the statute, sec. 66.0307 expressly addresses and defines the rights and responsibilities only between the parties participating in a cooperative plan. See subsections (2), (3)(a), (3)(b), (3)(d)4m, (3)(d)8, (4)(a), (4)(a)2, (4)(a)3, (4)(a)4, (4)(b), (4)(c), (4)(d)1 and 2, (4)(e), (4)(f), (5)(c)2, 5(d), (7m), (8)(a), and (8)(c). In this context, where the content and structure of the overall statute target the procedure for establishing a cooperative plan and the rights and responsibilities of municipalities actually participating in the plan, it seems incongruous at best that the statute would also be aimed at barring the statutory annexation rights of non-participating municipalities without affirmatively and unmistakably so providing.

A more reasonable contextual interpretation of sec. 66.0307(7)(b) provides limits only to the ability of municipalities participating in a cooperative plan to alter their own boundaries for land included in the plan during the planning period adopted in the plan. This should not be surprising, since the whole purpose of a cooperative plan is to freeze boundaries by agreement between the parties to the plan for a defined period of time.

A second reason why a cooperative plan does not bar the statutory annexation rights of a non-participating municipality under sec. 66.0307(7)(b) is found in sec. 66.0307 (6). There the statute provides that a cooperative plan is “binding on the parties to the plan and [has] the force and effect of a contract.”

Why would a statute expressly provide that parties to a cooperative plan are bound by the plan if, as the City of Madison argues here, the plan also binds non-parties? Why define the relationship between parties to the plan as contractual if the plan has extra-contractual effect on non-parties the likes of which appear no where else in contract law? How does a contract between the parties deprive strangers to the contract of statutory annexation rights they would otherwise enjoy?

If the legislature had intended such extra-contractual deprivation, it would have stated as much in unequivocal language. It did not, and this court is not at liberty to supply the missing language, especially where doing so results in canceling rights expressly accorded to defendants by the legislature.

II. Rule of Prior Precedence:

¶ 9 The rule of prior precedence is a common law rule “created to ensure that the proceedings first instituted have precedence.” *115 *Town of Delavan*, 176 Wis.2d at 532, 500 N.W.2d at 273 (citation omitted). The rule provides that “in case of conflict between competing annexations, or between an annexation and a proceeding for the incorporation of a city or village, the proceeding first instituted has precedence, and the later one must yield.” *Village of Brown Deer v. City of Milwaukee*, 274 Wis. 50, 58, 79 N.W.2d 340, 344–45 (1956). The purpose of the rule is “to ensure the smooth dovetailing of multiple proceedings.” *Delavan*, 176 Wis.2d at 534, 500 N.W.2d at 274.

In re Incorporation as a Vill. of Certain Territory in Town of Campbell, 266 Wis. 2d 107, 114–15 (Ct. App. 2003).

Here we do not have competing annexations or a conflict between an annexation and a municipal incorporation proceeding. So the Rule of Prior Precedence is not implicated by the above case.

However, the Supreme Court has also expanded application of the rule to a situation involving a competing annexation and a proceeding for the consolidation of a town and city, *Vill. of Brown Deer v. City of Milwaukee*, 274 Wis. 50 (1956). This fact situation is also absent here, so *Brown Deer* provides no justification for applying the Rule in our case.

At oral argument, the City of Madison agreed that no precedent exists for extending the Rule of Prior Precedence to the case at bar. Accordingly, the City is essentially asking this court to make new law, which is not this court’s prerogative.

Even if this court could make new law, our Supreme Court has expressed reservation about extending the Rule of Prior Precedence to situations where the legislature has already seen fit to act:

We see no need for extending application of the Rule of Prior Precedence to cover situations that have already been granted statutory protection.

Town of Delavan v. City of Delavan, 176 Wis. 2d 516, 538 (1993). While not precisely on point, the above passage urges caution in extending court-made rules to statutory schemes – another reason why the City of Madison’s recourse on this point is with the Supreme Court, not here.

CONCLUSION

The court grants summary judgment to the defendants dismissing plaintiff City of Madison's complaint in its entirety, on the merits, with prejudice and with costs and disbursements as allowed by law. Defendants are to draft, file and serve the appropriate closing paperwork within fifteen (15) days.

Dated this 20th day of February, 2020.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Richard G. Niess', is written over a horizontal line. The signature is highly stylized and somewhat illegible.

Richard G. Niess
Circuit Judge

cc: Counsel

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West's Wisconsin Statutes Annotated
Municipalities (Ch. 59 to 68)
Chapter 66. General Municipality Law (Refs & Annos)
Subchapter III. Intergovernmental Cooperation

W.S.A. 66.0307

66.0307. Boundary change pursuant to approved cooperative plan

Effective: September 23, 2017

Currentness

(1) **Definitions.** In this section:

(af) "Comprehensive plan" means an adopted plan that contains the elements under s. 66.1001(2) or, if a municipality has not adopted a plan that contains those elements, a master plan adopted under s. 62.23(2) or (3).

(am) "Department" means the department of administration.

(b) "Municipality" means a city, village or town.

(2) **Boundary change authority.** Any combination of municipalities may determine the boundary lines between themselves under a cooperative plan that is approved by the department under this section. A single city or village and a single town may use the mediated agreement procedure under sub. (4m) to determine a common boundary line under a cooperative plan that is approved by the department under this section. No boundary of a municipality may be changed or maintained under this section unless the municipality is a party to the cooperative agreement. The cooperative plan shall provide one or more of the following:

(a) That specified boundary line changes shall occur during the planning period and the approximate dates by which the changes shall occur.

(b) That specified boundary line changes may occur during the planning period and the approximate dates by which the changes may occur.

(c) That a required boundary line change under par. (a) or an optional boundary line change under par. (b) shall be subject to

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the occurrence of conditions set forth in the plan.

(d) That specified boundary lines may not be changed during the planning period.

(3) Cooperative plan. (a) *Who may prepare plan.* The municipalities that propose to set the boundary lines between themselves under this section shall prepare a cooperative plan.

(b) *Purpose of plan.* The cooperative plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the territory covered by the plan consistent with the comprehensive plan of each participating municipality.

(c) *Content of plan; consistency with comprehensive plan.* The cooperative plan shall describe how it is consistent with each participating municipality's comprehensive plan.

(d) *Content of plan; boundaries and services.* The cooperative plan shall:

1. Identify any boundary change and any existing boundary that may not be changed during the planning period.
2. Identify any conditions that must be met before a boundary change may occur.
3. Include a schedule of the period during which a boundary change shall or may occur.
4. Include a statement explaining how any part of the plan related to the location of boundaries meets the approval criteria under sub. (5)(c) 5.
- 4m. Identify all highways within the territory covered by the plan of which each participating municipality has jurisdiction.
5. Describe the services to be provided to the territory covered by the plan, identify the providers of those services and indicate whether the provision of any service has received preliminary approval of any relevant governmental regulatory authority.

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6. Include a schedule for delivery of the services described under subd. 5.

7. Include a statement explaining how provision under the plan for the delivery of necessary municipal services to the territory covered by the plan meets the approval criterion under sub. (5)(c)3.

8. Designate the municipalities that are participating in the cooperative plan and that are required to ratify any boundary changes by enacting an ordinance under sub. (10).

(e) *Content of plan; compatibility with existing law.* The cooperative plan shall describe how the plan is consistent with current state and federal laws, county shoreland zoning ordinances under s. 59.692, municipal regulations and administrative rules that apply to the territory affected by the plan.

(f) *Content of plan; planning period.* The cooperative plan shall specify the duration of the proposed planning period, which shall be for a period of 10 years, except that the duration of the proposed planning period may be for a period greater than 10 years if a duration greater than 10 years is approved by the department.

(g) *Content of plan; zoning agreement.* The cooperative plan shall include all agreements under sub. (7m).

(h) *Existing plans may be used.* A cooperative plan may be based on, contain elements of or duplicate any existing plan for the same territory.

(4) Procedure for adopting cooperative plan. (a) *Authorizing resolution.* Each municipality that intends to participate in the preparation of a cooperative plan under this section shall adopt a resolution authorizing participation in the preparation of the plan. Notice of each resolution shall be given in writing, within 5 days after the resolution is adopted, to all of the following:

1. The department, the department of natural resources, the department of agriculture, trade and consumer protection and the department of transportation.

2. The clerks of any municipality, school district, technical college district, sewerage district or sanitary district which has any part of its territory within 5 miles of a participating municipality.

3. The clerk of each county in which a participating municipality is located.

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4. Any county zoning agency under s. 59.69(2) or regional planning commission whose jurisdiction includes a participating municipality.

(b) *Public hearing.* At least 60 days after adoption under par. (a) of the last resolution by a participating municipality and at least 60 days before submitting a cooperative plan to the department for review and approval under sub. (5), the participating municipalities shall hold a joint hearing on the proposed plan. Notice of the hearing shall be given by each participating municipality by class 3 notice under ch. 985.

(c) *Comment on plan.* Any person may comment on the plan during the hearing and may submit written comments before, at or within 20 days following the hearing. All comments shall be considered by each participating municipality. A county zoning agency under s. 59.69(2) or regional planning commission whose jurisdiction includes any participating municipality shall comment in writing on the plan's effect on the master plan adopted by the regional planning commission under s. 66.0309(9), or development plan adopted by the county board or county planning agency under s. 59.69(3), and on the delivery of municipal services, and may comment on any other aspect of the plan. A county in the regional planning commission's jurisdiction may submit comments on the effect of the cooperative plan on the master plan adopted under s. 66.0309(9) and on the delivery of county services or on any other matter related to the plan.

(d) *Adoption of final plan.* 1. Subject to subd. 2, after the public hearing under par. (b) and consideration of comments made on the proposed cooperative plan, the plan participants may revise the plan in response to the comments and may, by resolution adopted by each participating municipality, adopt a final version of the plan.

2. If within 30 days after the public hearing under par. (b) a petition opposing the plan, signed by a number of qualified electors equal to at least 10 percent of the votes cast for governor in the municipality at the last gubernatorial election, is filed with the clerk of a participating municipality, the final version of the plan may be adopted in that municipality only by an affirmative vote of three-fourths of the members of the municipality's governing body who are present and voting. The petition shall conform to the requirements of s. 8.40.

(e) *Advisory referendum.* 1. Within 30 days after adoption of a final plan under par. (d), the governing body of a participating municipality may adopt a resolution calling for an advisory referendum on the plan. An advisory referendum shall be held if, within 30 days after adoption of the final plan under par. (d), a petition, signed by a number of qualified electors equal to at least 10 percent of the votes cast for governor in the municipality at the last gubernatorial election, is filed with the clerk of a participating municipality and as provided in s. 8.37, requesting an advisory referendum on the cooperative plan. The petition shall conform to the requirements of s. 8.40.

2. The advisory referendum shall be held not less than 70 days nor more than 100 days after adoption of the resolution under subd. 1. calling for the referendum or not less than 70 days nor more than 100 days after receipt of the petition by the municipal clerk. The municipal clerk shall give notice of the referendum by publishing a notice in a newspaper of general circulation in the municipality, both on the publication day next preceding the advisory referendum election and one week prior to that publication date.

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3. The advisory referendum shall be conducted by the municipal election officials. The governing body of the municipality may specify the number of election officials for the referendum. The ballots shall contain the words "For the cooperative plan" and "Against the cooperative plan" and shall otherwise conform to the provisions of s. 5.64(2). The election shall be conducted as are other municipal elections in accordance with chs. 6 and 7, insofar as applicable.

4. The election inspectors shall report the results of the election, showing the total number of votes cast and the numbers cast for and against the cooperative plan. The election inspectors shall attach their affidavit to the report and immediately file the report in the office of the municipal clerk. The election inspector shall file a certified report of the results in the office of the clerk of each municipality that is a party to the cooperative plan.

5. The costs of the advisory referendum election shall be borne by the municipality that holds the election.

(f) *Submittal of final plan to department.* If no advisory referendum is held under par. (e), the plan participants may submit the final version of the cooperative plan to the department for approval under sub. (5) at least 60 days but not more than 180 days after the public hearing under par. (b). If an advisory referendum is held under par. (e), each participating municipality shall determine, by resolution, whether to submit the final version of the cooperative plan to the department for approval under sub. (5). The resolution shall be adopted within 60 days after the last advisory referendum is held. If any of the plan participants fails or refuses to approve submittal of the cooperative plan to the department, the plan may not be submitted. Any written comment received by a participating municipality on any version of the cooperative plan shall be submitted to the department at the time that the cooperative plan is submitted. If the cooperative plan is not submitted to and approved by the department, it may not be implemented under this section by any of the participating municipalities.

(4m) Mediated agreement procedure. (a)1. As an alternative to the parties mutually invoking the procedure under this section, a city, village, or town may petition the department for mediation of a cooperative plan under this paragraph.

2. A city or village may petition for mediation if all of the following apply:

a. The city or village adopts an authorizing resolution under sub. (4)(a)(intro.) and requests in writing an adjacent town to adopt an authorizing resolution under sub. (4)(a)(intro.) and the town fails to adopt the resolution within 60 days after the request is received by the town.

b. The city or village has adopted a comprehensive plan.

3. A town may petition for mediation if all of the following apply:

a. The town adopts an authorizing resolution under sub. (4)(a)(intro.) and requests in writing an adjacent city or village to

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adopt an authorizing resolution under sub. (4)(a)(intro.) and the city or village fails to adopt the resolution within 60 days after the request is received by the city or village.

b. The town has adopted a comprehensive plan.

(b) A municipality that is authorized under par. (a) to petition the department for mediation and elects to do so shall submit the petition within 90 days after the municipality has adopted the authorizing resolution described in par. (a)2. a. or 3. a. Upon receipt of a petition for mediation, the department shall notify the nonpetitioning adjacent municipality identified in the petition that the petition has been submitted. Within 45 days after receipt of notice from the department that a petition has been submitted, the nonpetitioning municipality shall notify the department whether it agrees to engage in mediation to develop a cooperative plan under this section. Failure of the nonpetitioning municipality to timely notify the department is considered notice that the municipality does not agree to engage in mediation. The department shall send written notice of the nonpetitioning municipality's decision, on whether it will participate, to the petitioning municipality. If the nonpetitioning municipality refuses to engage in mediation, the petitioning municipality may not submit a petition under this paragraph involving the same nonpetitioning municipality for a period of 3 years after the department sends notice of the refusal.

(c)1. If a nonpetitioning town refuses under par. (b) to engage in mediation, the town may not contest any annexation of its territory to the petitioning city or village that is commenced during the shorter of the following periods:

a. The period of 270 days beginning after the town refuses under par. (b) to engage in mediation.

b. The period beginning on the date the town refuses under par. (b) to engage in mediation and ending on the date the town agrees to engage in mediation.

2. If a nonpetitioning city or village refuses under par. (b) to engage in mediation, an annexation of territory of the petitioning town to the nonpetitioning city or village that is commenced during the shorter of the following periods shall be reviewed by the department in the manner described under s. 66.0217(6), regardless of the population of the county in which the annexation proceeding is commenced, and, notwithstanding s. 66.0217(11)(c), may be contested by the town if the department determines that the annexation is not in the public interest:

a. The period of 270 days beginning after the city or village refuses under par. (b) to engage in mediation.

b. The period on the date the city or village refuses under par. (b) to engage in mediation and ending on the date the city or village agrees to engage in mediation.

(d)1. If both the petitioning municipality and nonpetitioning municipality agree to engage in mediation to develop a

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cooperative plan under this section, the municipalities shall select a mediator. The department may assist the municipalities in selecting a mediator. If the municipalities are unable to agree on the selection of a mediator, the department shall furnish a list of 5 mediators to the municipalities. The municipalities shall alternatively strike a name from the list until one name remains, who shall be the mediator.

2. The mediator shall assist the parties through recognized mediation techniques to develop and reach agreement on a cooperative plan under this section. Unless the participating municipalities agree to extend the mediation period, the mediation period expires after 270 days. Unless they agree otherwise, the participating municipalities are equally responsible for the costs of the mediation.

(e) Before the participating municipalities engage in mediation under this subsection, each shall adopt a resolution under sub. (4)(a)(intro.) and provide the required notice of the resolution. Notwithstanding sub. (4)(b), if the participating municipalities agree on a cooperative plan under this subsection, a public hearing on the plan shall be held under sub. (4)(b) no sooner than 45 days after agreement is reached and at least 45 days before submitting the plan to the department for review and approval under sub. (5).

(f) If any litigation contesting annexation of territory of the petitioning or nonpetitioning town to the city or village is commenced during the 3-year period after the department receives the petition for mediation under par. (b), the judge shall under s. 802.12(2), unless the nonpetitioning municipality objects, order the parties to select a settlement alternative under s. 802.12(1)(i) as a means to attempt settlement.

(5) Department review and approval of local or cooperative plan. (a) *Generally.* The department shall make a written determination of whether to approve a cooperative plan within 90 days after receiving the plan unless the department and the parties to the plan agree to a longer determination period. The department shall consider written comments on the plan received by a municipality under sub. (4)(c) that is submitted to the department under sub. (4)(f) or from any other source. The department may request information relating to the cooperative plan, including any comprehensive plan or land use plan currently being utilized by any participating municipality, from that municipality, and from any county or regional planning commission. The department may seek and consider comments from any state agency on whether the cooperative plan is consistent with state laws and administrative rules under the agency's jurisdiction. Any state agency requested to comment on a cooperative plan shall comply with the request. The department shall issue its determination of whether to approve the cooperative plan in writing, supported by specific findings based on the criteria under par. (c). The approval or disapproval of a cooperative plan by the department under this section is not a contested case, as defined in s. 227.01(3), for purposes of ch. 227.

(b) *Hearing.* Any person may request a public hearing before the department on a cooperative plan submitted to the department for approval. A request for a public hearing shall be in writing and shall be submitted to the department within 10 days after the cooperative plan is received by the department. If requested, the department shall, and on its own motion the department may, hold a public hearing on the cooperative plan. If requested to hold a public hearing, the department is required to hold only one hearing, regardless of the number of requests for a hearing. Any public hearing under this paragraph shall be held in a municipality that is a party to the cooperative plan.

(c) *Approval of cooperative plan.* A cooperative plan shall be approved by the department if the department determines that

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all of the following apply:

1. The content of the plan under sub. (3)(c) to (e) is sufficient to enable the department to make the determinations under subs. 2. to 5.
2. The cooperative plan is consistent with each participating municipality's comprehensive plan and with current state laws, municipal regulations, and administrative rules that apply to the territory affected by the plan.
3. Adequate provision is made in the cooperative plan for the delivery of necessary municipal services to the territory covered by the plan.
5. The shape of any boundary maintained or any boundary change under the cooperative plan is not the result of arbitrariness and reflects due consideration for compactness of area. Considerations relevant to the criteria under this subdivision include quantity of land affected by the boundary maintenance or boundary change and compatibility of the proposed boundary maintenance or boundary change with natural terrain including general topography, major watersheds, soil conditions and such features as rivers, lakes and major bluffs.
6. Any proposed planning period exceeding 10 years is consistent with the plan.

(d) *Return and resubmittal of plan.* The department may return a cooperative plan, with comments, if the department determines that the cooperative plan, if revised, may constitute a plan that can be approved by the department. If a cooperative plan is returned under this paragraph, each participating municipality may revise the plan, as directed by the department, adopt the revised plan by resolution and resubmit the plan to the department within 90 days after the plan is returned. After receiving a resubmitted cooperative plan, the department shall make a determination on approval within 30 days.

(6) Binding elements of cooperative plan. If a cooperative plan is approved by the department under sub. (5) or an amended plan is approved under sub. (8), provisions in the plan to maintain existing boundaries, the boundary changes in the plan, the schedule for those changes, the plan for delivery of services, including road maintenance, and the schedule for those services are binding on the parties to the plan and have the force and effect of a contract.

(7) Other boundary procedures. (a) *Other procedures after hearing.* After the joint hearing under sub. (4)(b) is held, no other procedure, except the procedure under s. 281.43(1m), for altering a municipality's boundaries may be used to alter a boundary included in the proposed cooperative plan under sub. (3)(d)1. until the boundary is no longer included in the proposed cooperative plan, the municipality withdraws from the proposed cooperative plan or the proposed cooperative plan fails to receive approval from the department, whichever occurs first.

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(b) *Other boundary procedures during the planning period.* During the planning period specified under sub. (3)(f), no other procedure for altering a municipality's boundaries may be used to alter a boundary that is included in the cooperative plan under sub. (3)(d)1., except if an annexation is conducted under s. 281.43(1m), regardless of whether the boundary is proposed to be maintained or changed or is allowed to be changed under the plan. After the planning period has expired, the boundary may be altered.

(7m) Zoning in town territory. If a town is a party to a cooperative plan with a city or village, the town and city or village may agree, as part of the cooperative plan, to authorize the town, city or village to adopt a zoning ordinance under s. 60.61, 61.35 or 62.23 for all or a portion of the town territory covered by the plan. The exercise of zoning authority by a town under this subsection is not subject to s. 60.61(3) or 60.62(3). If a county zoning ordinance applies to the town territory covered by the plan, that ordinance and amendments to it continue until a zoning ordinance is adopted under this subsection. If a zoning ordinance is adopted under this subsection, that zoning ordinance continues in effect after the planning period ceases until a different zoning ordinance for the territory is adopted under other applicable law. This subsection does not affect zoning ordinances adopted under s. 59.692 or 87.30 or ch. 91.

(8) Amendments to cooperative plan. (a) *Authority to amend plan.* A cooperative plan may be amended during the planning period if all the parties to the plan agree to the amendment and if the amendment is approved by the department.

(b) *When full procedure required.* An amendment to a cooperative plan that proposes to change a municipality's boundary or to change the approved planning period shall follow the same procedure as that required for an original plan.

(c) *When expedited procedure may occur.* An amendment to a cooperative plan that does not propose to change a boundary or the planning period shall follow the same procedure as that required for an original plan except that the hearing under sub. (4)(b) is not required unless objection to the amendment is made in writing by any person to the clerk of a participating municipality. An amendment under this paragraph shall be adopted by resolution of each of the participating municipalities. Notice of the amendment and adopting resolution shall follow the procedures specified in sub. (4)(a). Notice that the amendment will be submitted directly to the department unless objection is made in writing shall be given by each participating municipality by a class 3 notice under ch. 985. If no written objection to the amendment is received within 7 days after the last required notice is published, the amendment may be submitted directly to the department for approval. If written objection is timely made, the public hearing and other requirements under sub. (4)(b) and (c) apply.

(9) Court review of department decision. The decision of the department under sub. (5)(c) or (d) or (8) to approve or not to approve a cooperative plan or an amendment to a plan is subject to judicial review under ch. 227.

(10) Boundary change ordinance; filing and recording requirements. A boundary change under a cooperative plan shall be accomplished by the enactment of an ordinance by the governing body designated to do so in the plan. The filing and recording requirements under s. 66.0217(9)(a), as they apply to cities and villages under s. 66.0217(9)(a), apply to municipalities under this subsection. The requirements for the secretary of administration are the same as those required in s. 66.0217(9)(b).

(11) Time for bringing action. No action to contest the validity of a cooperative plan under this section or an amendment to

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a cooperative plan, regardless of the grounds for the action, may be commenced after 60 days from the date on which the department approves the cooperative plan under sub. (5) or the amendment under sub. (8), respectively. No action relating to compliance with a binding element of a cooperative plan may be commenced later than 180 days after the failure to comply.

Credits

<<For credits, see Historical Note field.>>

Notes of Decisions (1)

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